

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT**

**IN RE:
TERENCE O. DENNISON and
MARIJO H. DENNISON**

Chapter 7

Debtors

Case No. 03-23114

MARIJO H. DENNISON

Plaintiff

v.

**DAN M. DAVIS, WINDHAM COUNTY
(VERMONT) STATE'S ATTORNEY,
CHARLES A. BERGMANN, and
HERMINE M. BERGMANN**

Defendants

Adversary Proceeding

No. 04-2085

APPEARANCES:

**John K. Harris, Jr., Esq., Jackson Harris Burlingame & Hubert, LLC
245 Main Street, Danielson, CT 06239
Counsel for Plaintiff**

**Julie A. Manning, Esq. and Hanh V. Huynh, Esq., Shipman & Goodwin LLP
One Constitution Plaza, Hartford, CT 06103
Counsel for Defendants Charles A. and Hermine M. Bergmann**

MEMORANDUM OF DECISION

KRECHEVSKY, U.S.B.J.

I.

In this adversary proceeding, the dominant issue is whether the plaintiff - debtor

may recover, pursuant to Bankruptcy Code §362(h)¹, monetary damages, including attorney's fees and costs, for emotional distress she testified to as a result of the defendant - creditor's violation of the automatic stay.

II.

BACKGROUND

Marijo H. Dennison ("the Debtor"), together with her husband, Terence O. Dennison ("Mr. Dennison") (together "the debtors"), filed a joint Chapter 7 bankruptcy petition on October 6, 2003. The petition listed Charles A. Bergmann ("the Creditor") and Hermine M. Bergmann (together "the Bergmanns") as holding a judgment debt of \$55,375.96.

The Creditor, on December 7, 2003, following the debtors' first meeting of creditors, which the Creditor attended, recorded a telephone message on the debtors' voicemail service demanding that his claim be removed from the debtors' bankruptcy filing, and threatening that he would start criminal proceedings in Vermont on the "bounced" checks the Debtor had issued totaling \$13,400 ("the telephone call"). Receiving no response, the Creditor filed a complaint with the Vermont State's Attorney's Office which then filed criminal charges against the Debtor.

The Debtor, on October 5, 2004, filed the instant complaint against the Bergmanns based on an asserted violation of the automatic stay, and against the Vermont State's Attorney to enjoin him from prosecuting the Debtor. This court, on February 15, 2005, granted the State's Attorney's motion to dismiss the complaint as

¹ Bankruptcy Code §362(h) states: "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

to him concluding that “the States’ Attorney’s office [proceeding] concerning the debtor’s bad check was excepted from the automatic stay pursuant to §362(b)(1) as the commencement of a criminal proceeding.” Dennison v. Davis (In re Dennison), 321 B.R. 378, 384 (Bankr. D.Conn. 2005).²

The court held a hearing on the complaint on June 7, 2005, at which only the Debtor and Mr. Dennison testified, the Creditor declining to put on any testimony. The Debtor testified that following the telephone call she has suffered, to the present time, from dread, anxiety, nausea and extensive weight loss. The Debtor is employed as a bookkeeper and cares for her 70 year old husband. The Debtor did not distinguish between the Vermont criminal proceeding and the telephone call as the cause for her symptoms. During cross-examination, the Debtor rejected an apology from the Creditor as proper resolution of her complaint.

Mr. Dennison testified that, following the telephone call, the Debtor suffered from anxiety and lost weight. He stated that the Creditor had also contacted him at the creditors’ meeting requesting that his debt be removed from the bankruptcy proceeding.

III.

DISCUSSION

Bankruptcy Code §362(a)(6) provides that the filing of a bankruptcy petition operates as a stay against “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title,” and §362(h),

² In the same ruling, the court denied the Bergmanns’ motion to dismiss the complaint as to them.

as noted, provides a penalty for “any willful violation of a stay.”³

The Creditor argued in a pretrial memorandum: “The telephone call was not a willful violation of the stay since [the Creditor] was unaware at the time he made the call that he was prohibited by the Bankruptcy Code from [such contact].” (Bergmanns’ Mem. at 3.) Following the hearing, he also contended the Debtor failed to adduce expert testimony to support her claim of emotional distress and, moreover, that emotional distress is not compensable under §362(h).

A.

Willful Violation

Since the Creditor did not testify and never filed an answer to the complaint, there is nothing in the trial record to support his contention that he was “unaware.” In any event, the Second Circuit has held that “any deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of actual damages.” In re Crysen / Montenay Energy Co., 902 F.2d 1098, 1105 (2d Cir. 1990). “A ‘willful violation’ does not require a specific intent to violate the automatic stay.” Id. (quoting In re Bloom, 875 F.2d 224, 227 (9th Cir. 1989)).

The notice sent on October 10, 2003 by the Clerk of the Bankruptcy Court to the Bergmanns informing them of the bankruptcy and setting the time and place for the creditors’ meeting states:

Creditors May Not Take Certain Actions

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor’s property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

³ See note 1, supra.

The Creditor's actions constituted a "willful violation" for purposes of §362(h).

B.

Damages

(1)

The only serious issue in this proceeding is whether the Debtor sustained actual damages. There is presently no binding authority in the Second Circuit with regard to whether the "actual damages" recoverable pursuant to §362(h) include damages for emotional distress caused by the violation of stay. The Courts of Appeal that have considered the issue are in disagreement as to whether or when such damages may be awarded. The Creditor urges the court to follow Aiello v. Providian Financial Corp. (In re Aiello), 239 F.3d 876 (7th Cir. 2001). In Aiello, the Seventh Circuit held that remedies provided by §362(h) are not available for emotional distress caused by violations of the stay because the Bankruptcy Code protects only financial interests. The court reasoned that emotional distress claims "are so easy to manufacture," and adequate remedies are available under state tort law. Id. at 879-80. The Aiello court stated:

Th[e] protection [of the automatic stay], however, is financial in character; it is not protection of peace of mind.... The Bankruptcy Code was not drafted with reference to the emotional incidents of bankruptcy, however, and bankruptcy judges are not selected with reference to their likely ability to evaluate claims of emotional injury. That is not to suggest that victims of tortious infliction of emotional distress in the course of a bankruptcy proceeding are orphans of the law. A creditor who resorts to extortion or intimidation exposes himself to a suit under state tort law.... The office of section 362(h) is not to redress tort violations but to protect the rights conferred by the automatic stay.

Id. at 879-80.

The Ninth Circuit in Dawson v. Washington Mutual Bank, F.A. (In re Dawson),

390 F.3d 1139 (9th Cir. 2004), and the First Circuit in Fleet Mortgage Group, Inc. v. Kaneb, 196 F.3d 265 (1st Cir. 1999), are to the contrary and are more consonant with the holding of the Second Circuit on a related issue. In Eastern Equipment and Services Corp. v. Factory Point Nat'l Bank, 236 F.3d 117 (2d Cir. 2001), the Second Circuit held that the Bankruptcy Code preempted state law tort claims arising from violations of the automatic stay. The reasoning of Aiello, that remedies other than those pursuant to §362(h) are available to redress emotional distress caused by violations of the automatic stay, is thus inconsistent with Eastern Equipment.

In Dawson, the Ninth Circuit noted that “[b]y limiting the availability of actual damages under §362(h) to individuals, Congress signaled its special interest in redressing harms that are unique to human beings. One such harm is emotional distress, which can be suffered by individuals but not by organizations.” Id. at 1146. The court then cited the legislative history of the automatic stay provisions in support of its conclusion that the automatic stay was intended not only for protection against financial loss, but also to provide individual debtors with a respite from creditor harassment and aggressive collection tactics. Dawson, 390 F.3d 1139, 1148. The First Circuit ruled “that emotional damages qualify as ‘actual damages’ under §362(h)....The debtor’s actual injury here is somewhat imprecise, but it is real....” Fleet Mortgage Group, 196 F.3d at 269 (quotation marks and citations omitted). The court concludes that “actual damages” includes emotional distress damages.

(2)

As to the kinds of evidence that could prove the emotional distress damages sought, the Dawson court held that while “[c]orroborating medical evidence may be

offered [n]on-experts, such as family members, friends, or coworkers, may testify as to manifestations of mental anguish and clearly establish that significant emotional harm occurred.... In some cases significant emotional distress may be readily apparent even without corroborative evidence,” e.g., where a violator engaged in particularly egregious conduct. Id. at 1149-50. The Creditor’s contention that the Debtor was required to present expert testimony is denied.

(3)

The court credits the testimony of the Debtor and Mr. Dennison that, as a result of the Creditor’s telephone call, the Debtor suffered from anxiety, nausea and a substantial weight loss, entitling the Debtor to actual damages, including attorney’s fees and costs, from the Creditor. No judgment has been justified against Hermine M. Bergmann. Because the Debtor did not distinguish between her concerns over the Vermont criminal action (non-compensable) and the concerns arising from the telephone call (compensable), the court will assess \$250 as damages for the emotional distress. Debtor’s attorney shall file and serve on Creditor’s attorney an itemized application for attorney’s fees and costs within 15 days from the date of this ruling. Objections to such application, if any, must be filed within 10 days thereafter.

IV.

CONCLUSION

In accordance with the foregoing discussion, the court concludes that the Debtor is entitled to recover actual damages of \$250, plus reasonable costs and attorney’s fees from Charles A. Bergmann only. The Debtor’s complaint against Hermine M. Bergmann is dismissed.

Dated at Hartford, Connecticut this day of July, 2005.

**ROBERT L. KRECHEVSKY
UNITED STATES BANKRUPTCY JUDGE**

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JUDGMENT

This action came on for trial before the court, the Honorable Robert L. Krechevsky, Bankruptcy Judge, presiding, and the issues having been duly tried and the court having issued a Memorandum of Decision of even date, it is

ORDERED AND ADJUDGED that:

- 1. the plaintiff Marijo H. Dennison recover from defendant Charles A. Bergmann the sum of \$250, with post judgment interest thereon at the annual rate of 3.46%, as provided by law, plus reasonable attorney's fees and costs; and**
- 2. the action be dismissed on the merits as to defendant Hermine M. Bergmann.**

Dated at Hartford, Connecticut this day of July, 2005.

**ROBERT L. KRECHEVSKY
UNITED STATES BANKRUPTCY JUDGE**